

ORIGINAL

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 7 BOSTON MUTUAL LIFE INSURANCE
 COMPANY

FILED

07 DEC 26 AM 9:56

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY:

PDU

DEPUTY

8 UNITED STATES DISTRICT COURT
 9 SOUTHERN DISTRICT OF CALIFORNIA /

10 '07 CV 2409 L RBB

11 CHRISTOPHER O'KEEFE, } Case No.
 12 Plaintiff, }
 13 vs. }
 14 BOSTON MUTUAL LIFE } NOTICE OF REMOVAL OF ACTION
 15 INSURANCE COMPANY, an } TO UNITED STATES DISTRICT
 15 unknown business entity, and DOES 1 } COURT
 16 through 50 inclusive, } [San Diego Superior Court Case No. 37-
 16 Defendants. } Complaint Filed: November 16, 2007

17
 18 TO THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN
 19 DISTRICT OF CALIFORNIA AND TO PLAINTIFF AND HIS ATTORNEYS OF
 20 RECORD:

21 PLEASE TAKE NOTICE that on December 26, 2007, defendant BOSTON
 22 MUTUAL LIFE INSURANCE COMPANY ("Boston Mutual"),
 23 contemporaneously with the filing of this Notice, is effecting the removal of the
 24 above referenced civil action, Case No. BC372796, from the Superior Court of the
 25 State of California, for the County of San Diego, to the United States District Court,
 26 for the Southern District of California, based upon diversity jurisdiction pursuant to
 27 28 U.S.C. Sections 1332, 1441(b) and 1446, in that the suit has been brought
 28 between citizens of different states and the amount in controversy exceeds the sum

CR

LAW OFFICES
MESERVE,
MUMPER &
HUGHES LLP

89989.1

1 of \$75,000, exclusive of costs and interest. The suit is one of a civil nature over
 2 which the United States District Court has original jurisdiction.

3 The removal is based on the following grounds:

4

5 **I. TIMELINESS.**

6 1. On or about November 16, 2007, plaintiff CHRISTOPHER O'KEEFE
 7 (hereinafter "Plaintiff") commenced this action by filing a Complaint in the Superior
 8 Court of the State of California for the County of San Diego, entitled Christopher
 9 O'Keefe v. Boston Mutual Life Insurance Company, et al., designated Case No.
 10 BC372796.

11 2. Boston Mutual first received a copy of the Summons and Complaint on
 12 November 27, 2007. No prior pleading or paper has been received by or served on
 13 Boston Mutual. A true and correct copy of the Summons, Complaint and all other
 14 process, pleadings, and orders obtained by Boston Mutual are attached hereto and
 15 incorporated herein as Exhibit "A." Boston Mutual has received no other process,
 16 pleadings, or orders.

17 3. The Removal is therefore timely under 28 U.S.C. Section 1446(b) in
 18 that Boston Mutual has filed this Notice of Removal of Action within one (1) year
 19 of commencement of this action and within thirty (30) days of having first received
 20 the Summons and Complaint.

21

22 **II. JOINDER.**

23 4. There are no defendants that are required to join in this removal. All
 24 remaining defendants are fictitiously named and need not be considered for the
 25 purposes of removal. 28 U.S.C. § 1441(a).

26

27

28

1 **III. JURISDICTION.**

2 5. This action has been removed to this Court based upon diversity
 3 jurisdiction pursuant to 28 U.S.C. Sections 1332(a)(1), 1332(c)(1) 1441, and 1446 in
 4 that the suit has been brought between citizens of different states and the amount in
 5 controversy exceeds the sum of \$75,000, exclusive of costs and interest, as set forth
 6 more fully below. The suit is one of a civil nature over which the United States
 7 District Court has original jurisdiction.

8 **A. Citizenship of Boston Mutual.**

9 6. Defendant Boston Mutual, at all relevant times, was a corporation
 10 organized and existing under the laws of the Commonwealth of Massachusetts, with
 11 its principal place of business in Canton, Massachusetts, and is authorized to
 12 transact and is transacting the business of insurance in the State of California.

13

14 **B. Citizenship of Plaintiff.**

15 7. Boston Mutual is informed and believes, and on that basis alleges, that
 16 Plaintiff was, at the time of commencement of this action, and is now, a resident and
 17 citizen of the County of San Diego, State of California, which is where Plaintiff has
 18 filed this action. [See Complaint ¶ 35].

19

20 **C. Amount in Controversy.**

21 8. Plaintiff seeks recovery of disability benefits allegedly due to him as an
 22 insured under the terms and conditions of a disability insurance policy (hereinafter
 23 "Policy"), issued by Boston Mutual to Plaintiff. [Complaint, ¶¶ 18, 19, 25-27, 33,
 24 40].

25 9. Plaintiff has not specified the amount of damages he is seeking through
 26 his Complaint. However, Plaintiff alleges that he became disabled pursuant to the
 27 terms of the Policy on December 29, 2003. [Complaint, ¶ 5]. After the 91 day
 28 elimination period, Plaintiff would be eligible for benefits as of March 28, 2004.
 Plaintiff was paid benefits through May 28, 2007; however, as he alleges, his claim

1 was denied on or about September 20, 2007. [Complaint, ¶ 26]. Plaintiff further
 2 alleges that he remains disabled and eligible for benefits under the Policy.
 3 [Complaint]. The Policy at issue in the Complaint provides that benefits are payable
 4 until age 65 in the amount of \$6,000 per month, as long as Plaintiff satisfies the
 5 terms and conditions of the Policy. Therefore, Plaintiff is seeking recovery of
 6 benefits from at least May 2007 to the present, totaling \$42,000, or 7 months of
 7 benefits (\$6,000 x 7 months), exclusive of interest or costs.

8 10. Moreover, in an action for breach of the implied covenant of good faith
 9 and fair dealing, a plaintiff may recover future benefits as well as past benefits. See
 10 Egan v. Mutual of Omaha Ins. Co., 24 Cal. 3d 809, 824, 169 Cal. Rptr. 691, 699, fn.
 11 7 (Cal. 1979). “[T]he jury [or judge] may include in the compensatory damage
 12 award future policy benefits that they reasonably conclude, after examination of the
 13 policy’s provisions and other evidence, the policy holder would have been entitled
 14 to receive had the contract been honored by the insurer.” Id. Plaintiff has included
 15 a claim for “Breach of Covenant of Good Faith and Fair Dealing” in his Complaint,
 16 and thus can potentially recover future benefits, as well as past benefits. [Complaint
 17 ¶¶ 42-46]. In fact, in his Complaint, Plaintiff contends that he remains disabled, that
 18 Boston Mutual continues to wrongfully withhold benefits, and that he is therefore
 19 entitled to benefits under the terms of the Policy. [Complaint, ¶¶ 18, 19, 25-27, 33,
 20 40, 42-46]. Plaintiff was born on September 25, 1958 and will turn age 65 on
 21 September 25, 2023. Thus, Plaintiff can potentially recover an additional 189
 22 months of future benefits, totaling \$1,134,000.00 (189 x \$6,000) not discounted to
 23 present value. Additionally, by filing this unlimited civil action in the Superior Court,
 24 Plaintiff is attesting that the amount in controversy at least meets the jurisdictional
 25 limit of the Superior Court, or \$50,000.

26 12. The foregoing sums are also exclusive of the general, emotional
 27 distress and attorneys’ fees damages that Plaintiff seeks through his Complaint.
 28 [Complaint, ¶¶ 7, 25, 33, 41, 45, and Prayer]; see Galt G/S v. JSS Scandinavia, 142

1 F. 3d 1150 (9th Cir. 1998) (holding that attorneys' fees that plaintiffs can recover as
 2 a matter of law must be considered by the Court in calculating the amount in
 3 controversy). Plaintiff can also seek and potentially recover attorneys' fees under
 4 state law, pursuant to Brandt v. Superior Court (Standard Ins.), 37 Cal. 3d 813, 817,
 5 210 Cal. Rptr. 211, 213 (Cal. 1985) (a plaintiff can potentially recover attorneys'
 6 fees as a measure of damages under a breach of the implied covenant of good faith
 7 and fair dealing, and attorneys' fees must also be considered by the Court in
 8 assessing the amount in controversy of the action). Thus, these amounts must also
 9 be considered in calculating the amount in controversy.

10 13. Furthermore, in calculating the amount in controversy, the Court must
 11 also consider exemplary and punitive damages that Plaintiff can recover as a matter
 12 of law. See Surber v. Reliance Nat'l Indem. Co., 110 F. Supp. 2d 1227, 1232 (N.D.
 13 Cal. 2000) (citing Richmond v. Allstate Ins. Co., 897 F. Supp. 447, 450 (S.D. Cal.
 14 1995)). Again, in his Complaint, Plaintiff has included a claim for "Breach of
 15 Implied Covenant of Good Faith and Fair Dealing." Under state law, Plaintiff can
 16 therefore seek and potentially recover punitive and/or exemplary damages. See
 17 Silberg v. California Life Ins. Co., 11 Cal. 3d 452, 462 (Cal. 1974); Neal v. Farmers
 18 Ins. Exch., 21 Cal. 3d 910, 922-23, 148 Cal. Rptr. 289, 395-96 (Cal. 1978).
 19 Moreover, Plaintiff specifically seeks punitive damages through his Complaint.
 20 [Complaint, Prayer].

21 14. Plaintiff's failure to plead a specific amount of damages in his
 22 Complaint should be construed in favor of Boston Mutual, supporting a finding that
 23 the minimum amount in controversy has been met. See Bosinger v. Phillips Plastic
 24 Corporation, 57 F. Supp. 2d 986, 989 (S.D. Cal. 1999) ("[A]s such evidence [to
 25 show that the amount in controversy exceeds \$75,000] may not always be available
 26 to a removing defendant, to require such proof might defeat removal in an instance
 27 where a plaintiff declined to plead a specific amount of damages and a defendant
 28 could not readily ascertain the approximate amount of damages a plaintiff seeks

1 within thirty days. Moreover, while it is for the Court to decide its own jurisdiction,
2 the Court finds in Plaintiff's silence, implicit support for Defendant's allegation as
3 to the amount in controversy.").

4 15. In light of the fact that Plaintiff is seeking, and can potentially recover,
5 past benefits in the amount of \$42,000 and future benefits in the amount of
6 \$1,134,000 (totaling \$1,176,000), general damages for mental and emotional
7 distress, punitive and/or exemplary damages, other incidental damages, and
8 attorneys' fees, the amount in controversy in this case, exclusive of interest and
9 costs, clearly exceeds the jurisdictional requirement of this Court.

1 | IV. PROCESS.

12 16. On December 21, 2007, Boston Mutual filed an Answer to Plaintiff's
13 Complaint in the Superior Court of the State of California, for the County of San
14 Diego. A true and correct copy of the Answer is attached hereto and incorporated
15 herein as Exhibit "B."

16 17. On December 26, 2007, a copy of this Notice was filed with the Clerk
17 of the Superior Court of the State of California, for the County of San Diego.

18 WHEREFORE, Boston Mutual prays that the above action pending in the
19 Superior Court for the County of San Diego be removed from that court to this
20 Court.

21 | Dated: December 26, 2007

MESERVE, MUMPER & HUGHES LLP
SIMON MĀNOUCHERIAN
FREDERIC ESRAILIAN

By:

Simon Manoucherian
Attorneys for Defendant
BOSTON MUTUAL LIFE
INSURANCE COMPANY

4/27/07 2:20p

SUM-100

SUMMONS
(CITACION JUDICIAL)

NOTICE TO DEFENDANT:
(AVISO AL DEMANDADO):

BOSTON MUTUAL LIFE INSURANCE COMPANY, an unknown business entity, and DOES 1 through 50 inclusive

YOU ARE BEING SUED BY PLAINTIFF:
(LO ESTÁ DEMANDANDO EL DEMANDANTE):
CHRISTOPHER O'KEEFE

FOR COURT USE ONLY
SÓLO PARA USO DE LA COBERTURA

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto al desear que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.courtinfo.ca.gov/selfhelp/espanol), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.courtinfo.ca.gov/selfhelp/espanol) o poniéndose en contacto con la corte o el colegio de abogados locales.

The name and address of the court is:
(El nombre y dirección de la corte es):

Superior Court of California, County of San Diego
Hall of Justice

330 W. Broadway, San Diego, CA 92101

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:

(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):
Douglas M. Field, McDonnell & Associates, P.C.

2040 Harbor Island Dr., Suite 202, San Diego, CA 92101 619-294-4230

CASE NUMBER:
Número del Caso:

37-2007-00081644-CU-BC-CTL

DATE:
(Fecha)

NOV 16 2007

Clerk, by _____
(Secretario)

Deputy
(Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (Form POS-010).)

(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).

NOTICE TO THE PERSON SERVED: You are served

1. as an individual defendant.
2. as the person sued under the fictitious name of (specify):
3. on behalf of (specify): **Boston Mutual Life Insurance Company**
 - under: CCP 416.10 (corporation) CCP 416.60 (minor)
 - CCP 416.20 (defunct corporation) CCP 416.70 (conservatee)
 - CCP 416.40 (association or partnership) CCP 416.90 (authorized person)
 - other (specify): unknown business entity
4. by personal delivery on (date):

Form Adopted for Mandatory Use
Judicial Council of California
SUM-100 (Rev. January 1, 2004)

SUMMONS

Page 1 of 1
Code of Civil Procedure §§ 412.20, 465
American LegalNet, Inc. www.legalnet.com

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Douglas M. Field, SBN 257888 McDonnell & Associates, P.C. 2040 Harbor Island Dr., Suite 202 San Diego, CA 92101 TELEPHONE NO. 619-294-4230 ATTORNEY FOR (Name): Christopher O'Keefe		FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Diego STREET ADDRESS: 330 W Broadway MAILING ADDRESS: CITY AND ZIP CODE: San Diego, CA 92101 BRANCH NAME: Hall of Justice		
CASE NAME: O'Keefe v. Boston Mutual Life Insurance		
CIVIL CASE COVER SHEET <input checked="" type="checkbox"/> Unlimited <input type="checkbox"/> Limited (Amount demanded exceeds \$25,000) <input type="checkbox"/> (Amount demanded is \$25,000 or less)		Complex Case Designation <input type="checkbox"/> Counter <input type="checkbox"/> Joinder Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)
		CASE NUMBER: 37-2007-00081644-CU-BC-CTL JUDGE: DEPT:

Items 1-8 below must be completed (see instructions on page 2).

1. Check one box below for the case type that best describes this case:

Auto Tort <input type="checkbox"/> Auto (22) <input type="checkbox"/> Uninsured motorist (48)	Contract <input checked="" type="checkbox"/> Breach of contract/warranty (06) <input type="checkbox"/> Rule 3.740 collections (09) <input type="checkbox"/> Other collections (09) <input type="checkbox"/> Insurance coverage (16) <input type="checkbox"/> Other contract (37)	Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 3.400-3.403) <input type="checkbox"/> Antitrust/Trade regulation (03) <input type="checkbox"/> Construction defect (10) <input type="checkbox"/> Mass tort (40) <input type="checkbox"/> Securities litigation (28) <input type="checkbox"/> Environmental/Toxic tort (30) <input type="checkbox"/> Insurance coverage claims arising from the above listed provisionally complex case types (41)
Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort <input type="checkbox"/> Asbestos (04) <input type="checkbox"/> Product liability (24) <input type="checkbox"/> Medical malpractice (45) <input type="checkbox"/> Other PI/PD/WD (23)	Real Property <input type="checkbox"/> Eminent domain/inverse condemnation (14) <input type="checkbox"/> Wrongful eviction (33) <input type="checkbox"/> Other real property (26)	Enforcement of Judgment <input type="checkbox"/> Enforcement of judgment (20)
Non-PI/PD/WD (Other) Tort <input type="checkbox"/> Business tort/unfair business practice (07) <input type="checkbox"/> Civil rights (08) <input type="checkbox"/> Defamation (13) <input type="checkbox"/> Fraud (16) <input type="checkbox"/> Intellectual property (19) <input type="checkbox"/> Professional negligence (25) <input type="checkbox"/> Other non-PI/PD/WD tort (39)	Unlawful Detainer <input type="checkbox"/> Commercial (31) <input type="checkbox"/> Residential (32) <input type="checkbox"/> Drugs (38)	Miscellaneous Civil Complaint <input type="checkbox"/> RICO (27) <input type="checkbox"/> Other complaint (not specified above) (42)
Employment <input type="checkbox"/> Wrongful termination (36) <input type="checkbox"/> Other employment (15)	Judicial Review <input type="checkbox"/> Asset forfeiture (05) <input type="checkbox"/> Petition re: arbitration award (11) <input type="checkbox"/> Writ of mandate (02) <input type="checkbox"/> Other judicial review (39)	Miscellaneous Civil Petition <input type="checkbox"/> Partnership and corporate governance (21) <input type="checkbox"/> Other petition (not specified above) (43)

2. This case is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management

a. Large number of separately represented parties d. Large number of witnesses
 b. Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve e. Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court
 c. Substantial amount of documentary evidence f. Substantial postjudgment judicial supervision

3. Remedies sought (check all that apply): a. monetary b. nonmonetary; declaratory or injunctive relief c. punitive

4. Number of causes of action (Specify):

5. This case is not a class action suit.

6. If there are any known related cases, file and serve a notice of related case. (You may use form CM-015.)

Date: November 15, 2007
 Douglas M. Field

(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

NOTICE

- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.

Form Adopted for Mandatory Use
Judicial Council of California
CM-010 (Rev. July 1, 2007)**CIVIL CASE COVER SHEET**Cal. Rules of Court, rules 2.20, 3.220, 3.400-3.403, 3.740,
Cal. Standards of Judicial Administration, rule 3.16
www.courtinfo.ca.govAmerican LegalNet, Inc.
www.FormsWorldwide.com

1 Michael B. McDonnell, State Bar No. 107053
2 Douglas M. Field, State Bar No. 237888
2 McDONNELL & ROMAKER, P.C.
3 2040 Harbor Island Drive, Suite 202
3 San Diego, California 92101
4 Telephone: (619) 294-4230
4 Facsimile: (619) 294-4237

5 Attorneys for Plaintiff CHRISTOPHER O'KEEFE
6
7

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 IN AND FOR THE COUNTY OF SAN DIEGO

10 CHRISTOPHER O'KEEFE,

11 Plaintiff, Case No. 37-2007-00081844-CU-BC-CTL

12 vs.

13 BOSTON MUTUAL LIFE INSURANCE
14 COMPANY, an unknown business entity, and
15 DOES 1 through 50 inclusive

16 Defendants. } COMPLAINT FOR

17
18
19 1) Breach of Contract
20 2) Breach of Implied Covenant of
21 Good Faith and Fair Dealing
22 3) Unfair Business Practices

23 STATEMENT OF FACTS

24 1. Defendant BOSTON MUTUAL LIFE INSURANCE COMPANY ("BOSTON
25 MUTUAL"), is and at all times herein mentioned was, a Massachusetts Corporation organized
26 and existing under the laws of the State of Massachusetts with principle offices located at 120
27 Royal Street, in the City of Canton, Massachusetts.
28 2. Plaintiff CHRISTOPHER O'KEEFE (hereinafter sometimes referred to as "O'KEEFE")
is ignorant of the true names and capacities of Defendants sued herein as Does 1 through 50
inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this
complaint to allege their true names and capacities when ascertained.
3. Plaintiff is informed and believes and thereon alleges that at all times herein mentioned,

1 each of the defendants sued herein was the agent and/or employee of each of the remaining
 2 defendants and was at all times acting within the purpose and scope of such agency and/or
 3 employment.

4. O'KEEFE was a successful trial lawyer with his own busy practice. He was making
 5 approximately twenty five thousand dollars (\$25,000.00) per month for his services to his
 6 clients..

7. On December 29, 2003, O'KEEFE survived a life-altering car accident. He was driving
 8 on a busy freeway when another vehicle turned abruptly in front of him. He had to act quickly to
 9 avoid the collision. When he made an evasive maneuver, he lost control of his vehicle. His car
 10 spun around three times and flipped over three times. The car came to rest on a parallel access
 11 road some five lanes away from where the car spun out of control. No other cars were struck.
 12 Nobody else was injured.

13. O'KEEFE was not ejected from the car, but tossed about badly within. His seatbelt
 14 snapped. His head, when smashed against the windshield, shattered it. He suffered closed head
 15 injury; cervical, thoracic, and lumbar spine trauma; and significant psychological traumas.

16. Even now, in excess of three years post injury, O'KEEFE is in a daily struggle with the
 17 ongoing residuals of his physical, functional, emotional and psychological injuries.

18. O'KEEFE can not sit for long periods. He cannot stand for long periods. He cannot flex
 19 in normal ranges. He cannot sleep at night nor concentrate during the day. He has continued
 20 panic attacks, neck pain, headaches, chest pain, abdominal pain and lower back pain.

21. His pain management specialist prescribed several very powerful drugs.

22. 10. Concurrently, O'KEEFE is diagnosed as suffering Post Traumatic Stress Disorder
 23 ("PTSD").

24. 11. Disability RMS (hereinafter sometimes referred to as "RMS"), the claims administrator
 25 for BOSTON MUTUAL LIFE INSURANCE COMPANY, and Ms. Deborah Murphy, RMS's
 26 Senior Managed Disability Analyst, were aware that Mr. O'KEEFE suffered from PTSD. They
 27 were also aware that Mr. O'KEEFE, in an effort to manage his great pain, remained heavily
 28 medicated..

1 12. O'KEEFE was depressed, suffering from mental disabilities, experiencing sever pain and
 2 under the influence of powerful narcotics.

3 13. Nevertheless, RMS, acting on behalf of the BOSTON MUTUAL, demanded that
 4 O'KEEFE provide an extensive list of very specific documentation regarding his claim.

5 14. O'KEEFE's condition made it impossible to meet the overly burdensome demands placed
 6 upon him by BOSTON MUTUAL. He did not respond because he could not respond.

7 15. RMS did not investigate, but did suspend Mr. O'KEEFE's benefits because the very
 8 disability for which he'd purchased insurance made it impossible to meet the demands placed
 9 upon him by RMS.

10 16. Mr. O'KEEFE needed treatment, but could no longer afford to pay what KAISER would
 11 not. Consequently, Dr. Hammond, Mr. O'KEEFE's psychotherapist withdrew from treating
 12 O'KEEFE.

13 17. Rather than investigate, rather than attempt to help the insured BOSTON MUTUAL
 14 utilized the abandonment of O'KEEFE by his physician as an excuse to assert a failure of proof.

15 18. RMS refused to pay Mr. O'KEEFE his bargained for benefits because he could not prove
 16 treatment with Dr. Hammond, but Dr. Hammond is no longer authorized to practice in
 17 California. She lost her license. She would not provide her records. O'KEEFE did not have the
 18 records. The Bureau of Medical Quality Assurance could not get the records. RMS could not
 19 get the records.

20 19. RMS refused to pay Mr. O'KEEFE's benefits because he could not prove treatment with
 21 Hammond. He could not get replacement treatment because RMS will not pay benefits.
 22 Between his physical maladies and the psychological effects which derive from them, Mr.
 23 O'KEEFE is disabled.

24 20. Pursuant to the terms of his policy all symptoms are to be treated as one disability.

25 21. O'KEEFE paid for the assistance of BOSTON MUTUAL LIFE; He requires the
 26 assistance of BOSTON MUTUAL LIFE.

27 22. The insurance policy promises to pay Mr. O'KEEFE a certain sum if he cannot practice
 28 law. The pertinent language follows:

1 *Total Disability* means you are unable to perform the substantial and material
 2 duties of Your *Occupation* due to Injury or Sickness, and You are receiving
 3 regular medical care from a duly licensed physician other than Yourself.

4 Your *Occupation* means the occupation in which You are regularly engaged at the
 5 time YOU became disabled. If Your occupation is limited to recognized specialty
 6 within the scope of Your degree or license, We will deem Your specialty to be
 7 Your occupation.

8 *Injury* means a loss or disability which is a direct result of bodily injury caused by
 9 an accident which occurs while the policy is in force...

10 *Monthly Benefit* is the amount shown in the application....

11 Once a period of disability starts, We will deem it as one continuous disability no
 12 matter what Sickness or Injury causes it to continue.

13 A continuous period of disability ends when you are no longer totally disabled.

14 separate period of disability will be deemed continuous with a prior period if it:

- 15 a) starts within three (3) months after you return to your
 occupation; and
- 16 b) results in whole or in part from the same or a related sickness or
 injury. If periods of disability are deemed continuous, they count
 as a single period. If you become totally disabled...for six
 continuous months, We will waive any premiums which become
 due for any continuing periods of Total disability...

22 23. Mr. O'KEEFE provided RMS with a proof of loss and for awhile RMS reluctantly made
 23 payments to Mr. O'KEEFE under a reservation of rights.

24 25. Then, fully aware of Mr. O'KEEFE's debilitating illness, and aware that the policy
 25 contains no language authorizing such a request, RMS required additional, very specific
 26 documentation and used the excuse that the disabled insured could not respond in order to deny
 27 his family the benefits for which Mr. O'KEEFE had bargained.

28 26. On or about February 18, 2005, it became necessary for O'KEEFE to retain the services

1 of the law firm of McDonnell & Associates in order to represent him in recovering the benefits
 2 wrongfully withheld from O'KEEFE by BOSTON MUTUAL.

3 26. O'KEEFE made his claim to disability RMS on or about January of 2003, but not until
 4 approximately four years later, on September 20, 2007 did Disability RMS make a determination
 5 that O'KEEFE did not meet the definition of disability as defined in his policy.

6 27. During that four year period, Disability RMS and McDonnell & Associates exchanged
 7 volumes of correspondence as it was necessary to involve counsel to constantly demand that
 8 O'KEEFE receive payments that were due.

9 28. During this four year period during which RMS did not make a determination it was
 10 common practice for RMS to make one or two payments under reservation and to demand
 11 extensive documentation that they claimed was necessary in order to complete their
 12 investigation. But, when the requested documentation was produced, RMS would only demand
 13 still more documentation. This went on for years.

14 29. To this day, O'KEEFE wakes up and goes to sleep with headaches. He cannot work at a
 15 computer or concentrate in a reading position for more than twenty minutes without suffering
 16 debilitating headaches with accompanying cervical pain and pain between his shoulder blades.

17 30. O'KEEFE has frequent very sharp pain which initiates at his shoulder blades and shoots
 18 up to his head, down his back, and radiates throughout his chest. This pain worsens with
 19 prolonged standing, or sitting. The pain associated with these activities is unbearable and
 20 necessitates continued narcotic medication. He suffers sometimes incapacitating abdominal pain.

21 31. O'KEEFE has constant lower back pain that worsens with prolonged standing and is
 22 markedly exacerbated by bending, twisting and lifting even light items such as briefcases, files,
 23 or laptop computers.

24 32. In short, Mr. O'KEEFE has pain most all of the time - particularly in his cervical spine,
 25 head, chest and upper back, abdomen and low back. The pain exacerbates and remits. His
 26 condition necessitates the daily use of narcotics. The medications add confusion and burden. He
 27 is rarely out of pain.

28 33. Further, O'KEEFE has suffered great financial loss as a result of his accident and the

1 nonpayment of his disability payments by BOSTON MUTUAL. O'KEEFE lost his home, his
 2 law practice. He has spent his entire savings, including his child's college fund. His credit has
 3 been irreparably damaged. As a result of BOSTON MUTUAL'S unreasonable refusal to pay
 4 benefits due under the policy, O'KEEFE finds himself in dire financial straits, which only
 5 exasperates his physical and psychological ailments.

6 **BREACH OF CONTRACT**

7 34. Plaintiff incorporates paragraphs one through thirty-three and asserts the same as though
 8 fully set forth herein.

9 35. In the City of San Diego, County of San Diego, State of California, Plaintiff and
 10 defendant entered into a written insurance agreement, a copy of which is attached hereto as
 11 Exhibit "A" and made a part hereof.

12 36. The consideration set forth in the agreement was fair and reasonable.

13 37. O'KEEFE has performed all conditions, covenants, and promises required by him on his
 14 part to be performed in accordance with the terms and conditions of the contract. O'KEEFE
 15 suffered a loss covered under an insurance policy with BOSTON MUTUAL.

16 38. BOSTON MUTUAL was notified of the loss as required by the policy.

17 39. On or about September 20, 2007 BOSTON MUTUAL breached its duty to pay for a loss
 18 covered under the insurance policy..

19 40. By reason of Defendant's breach of said contract as herein alleged, the Plaintiff has
 20 suffered damages in an amount uncertain to be proven at trial.

21 41. By the terms of said written agreement, the O'KEEFE is entitled to recover reasonable
 22 attorney fees incurred in the enforcement of the provisions of the agreement. By reason of the
 23 aforementioned breach by the defendant, the O'KEEFE has been forced to secure the services of
 24 the legal firm of McDonnell & Associates, to prosecute this lawsuit.

25 **BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING**

26 42. Plaintiff incorporates paragraphs one through forty-one and alleges the same as though
 27 fully set forth herein.

28 43. In every insurance policy there is an implied obligation of good faith and fair dealing that

1 neither the insurance company nor the insured will do anything to injure the right of the other
 2 party to receive the benefits of the agreement.

3 44. To fulfill its implied obligation of good faith and fair dealing, an insurance company must
 4 give at least as much consideration to the interests of the insured as it gives its own interests.

5 45. As a result of unreasonably of the harassment as set out more fully above and as a result
 6 of withholding benefits due under the policy after being notified of the loss, BOSTON
 7 MUTUAL has violated the implied covenant of good faith and fair dealing contained in the
 8 insurance policy as against O'KEEFE. The facts of this case, as set out above, demonstrate that
 9 BOSTON MUTUAL has not given at least as much consideration to the interests of O'KEEFE as
 10 they gave to their own interests. As a result thereof, O'KEEFE is entitled to damages as prayed.

11 46. BOSTON MUTUAL's unreasonable failure to pay policy benefits was a substantial factor
 12 in causing O'KEEFE to suffer damages in an amount uncertain to be proven at trial.

13 **UNFAIR BUSINESS PRACTICES**

14 47. Plaintiff incorporates paragraphs one through forty-six and alleges the same as though
 15 fully set forth herein.

16 48. By reason of BOSTON MUTUAL's, fraudulent deceptive, unfair, and other wrongful
 17 conduct as herein alleged, BOSTON MUTUAL has violated California Business and Professions
 18 Code Section 17200 et seq. by consummating an unlawful, unfair, and fraudulent business
 19 practice, designed to deprive O'KEEFE of benefits due under the insurance policy.

20 By reason of the foregoing, O'KEEFE has suffered and continues to suffer damages in a sum
 21 which is, as yet unascertained. O'KEEFE will ask leave of court to amend this Complaint when
 22 the true nature and extent of the damages have been ascertained.

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28 WHEREFORE, O'KEEFE prays for judgment against Defendant BOSTON MUTUAL and each

1 of them, as follows:

2 1. For damages in the amount as yet uncertain but to be proved at trial.
3 2. For interest at 10% per annum.
4 3. For punitive damages according to proof at trial.
5 4. For attorneys' fees.
6 4. For such other and further relief as the court may deem proper.

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8 McDONNELL & ASSOCIATES
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11 DATED: November 15, 2007
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SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

CASE NUMBER: 37-2007-00081644-CU-BC-CTL CASE TITLE: O'keefe vs. Boston Mutual Life Insurance Company

NOTICE TO LITIGANTS/ADR INFORMATION PACKAGE

You are required to serve a copy of this Notice to Litigants/ADR Information Package and a copy of the blank Stipulation to Alternative Dispute Resolution Process (received from the Civil Business Office at the time of filing) with a copy of the Summons and Complaint on all defendants in accordance with San Diego Superior Court Rule 2.1.5, Division II and CRC Rule 201.9.

ADR POLICY

It is the policy of the San Diego Superior Court to strongly support the use of Alternative Dispute Resolution ("ADR") in all general civil cases. The court has long recognized the value of early case management intervention and the use of alternative dispute resolution options for amenable and eligible cases. The use of ADR will be discussed at all Case Management Conferences. It is the court's expectation that litigants will utilize some form of ADR – i.e. the court's mediation or arbitration programs or other available private ADR options as a mechanism for case settlement before trial.

ADR OPTIONS

1) CIVIL MEDIATION PROGRAM: The San Diego Superior Court Civil Mediation Program is designed to assist parties with the early resolution of their dispute. All general civil independent calendar cases, including construction defect, complex and eminent domain cases are eligible to participant in the program. Limited civil collection cases are not eligible at this time. San Diego Superior Court Local Rule 2.31, Division II addresses this program specifically. Mediation is a non-binding process in which a trained mediator 1) facilitates communication between disputants, and 2) assists parties in reaching a mutually acceptable resolution of all or part of their dispute. In this process, the mediator carefully explores not only the relevant evidence and law, but also the parties' underlying interests, needs and priorities. The mediator is not the decision-maker and will not resolve the dispute – the parties do. Mediation is a flexible, informal and confidential process that is less stressful than a formalized trial. It can also save time and money, allow for greater client participation and allow for more flexibility in creating a resolution.

Assignment to Mediation, Cost and Timelines: Parties may stipulate to mediation at any time up to the CMC or may stipulate to mediation at the CMC. Mediator fees and expenses are split equally by the parties, unless otherwise agreed. Mediators on the court's approved panel have agreed to the court's payment schedule for county-referred mediation: \$150.00 per hour for each of the first two hours and their individual rate per hour thereafter. Parties may select any mediator, however, the court maintains a panel of court-approved mediators who have satisfied panel requirements and who must adhere to ethical standards. All court-approved mediator fees and other policies are listed in the Mediator Directory at each court location to assist parties with selection. **Discovery:** Parties do not need to conduct full discovery in the case before mediation is considered, utilized or referred. **Attendance at Mediation:** Trial counsel, parties and all persons with full authority to settle the case must personally attend the mediation, unless excused by the court for good cause.

2) JUDICIAL ARBITRATION: Judicial Arbitration is a binding or non-binding process where an arbitrator applies the law to the facts of the case and issues an award. The goal of judicial arbitration is to provide parties with an adjudication that is earlier, faster, less formal and less expensive than trial. The arbitrator's award may either become the judgment in the case if all parties accept or if no trial de novo is requested within the required time. Either party may reject the award and request a trial de novo before the assigned judge if the arbitration was non-binding. If a trial de novo is requested, the trial will usually be scheduled within a year of the filing date.

Assignment to Arbitration, Cost and Timelines: Parties may stipulate to binding or non-binding judicial arbitration or the Judge may order the matter to arbitration at the case management conference, held approximately 150 days after filing, if a case is valued at under \$50,000 and is "at issue". The court maintains a panel of approved judicial arbitrators who have practiced law for a minimum of five years and who have a certain amount of trial and/or arbitration experience. In addition, if parties select an arbitrator from the court's panel, the court will pay the arbitrator's fees. Superior Court

3) SETTLEMENT CONFERENCES: The goal of a settlement conference is to assist the parties in their efforts to negotiate a settlement of all or part of the dispute. Parties may, at any time, request a settlement conference before the Judge assigned to their case; request another assigned judge or a pro tem to act as settlement officer; or may privately utilize the services of a retired judge. The court may also order a case to a mandatory settlement conference prior to trial before the court's assigned Settlement Conference judge.

4) OTHER VOLUNTARY ADR: Parties may voluntarily stipulate to private ADR options outside the court system including private binding arbitration, private early neutral evaluation or private judging at any time by completing the "Stipulation to Alternative Dispute Resolution Process" which is included in this ADR package. Parties may also utilize mediation services offered by programs that are partially funded by the county's Dispute Resolution Programs Act. These services are available at no cost or on a sliding scale based on need. For a list of approved DRPA providers, please contact the County's DRPA program office at (619) 238-2400.

ADDITIONAL ADR INFORMATION: For more information about the Civil Mediation Program, please contact the Civil Mediation Department at (619) 515-8908. For more information about the Judicial Arbitration Program, please contact the Arbitration Office at (619) 531-3818. For more information about Settlement Conferences, please contact the Independent Calendar department to which your case is assigned. Please note that staff can only discuss ADR options and cannot give legal advice.

TOTAL P.15

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO		FOR COURT USE ONLY
STREET ADDRESS: 330 West Broadway		
MAILING ADDRESS: 330 West Broadway		
CITY, STATE, & ZIP CODE: San Diego, CA 92101-3827		
BRANCH NAME: Central		
PLAINTIFF(S): Christopher O'keefe		
DEFENDANT(S): Boston Mutual Life Insurance Company		
SHORT TITLE: O'KEEFE VS. BOSTON MUTUAL LIFE INSURANCE COMPANY		
STIPULATION TO ALTERNATIVE DISPUTE RESOLUTION PROCESS (CRC 3.221)		CASE NUMBER: 37-2007-00081644-CU-BC-CTL

Judge: Steven R. Denton

Department: C-73

The parties and their attorneys stipulate that the matter is at issue and the claims in this action shall be submitted to the following alternative dispute resolution process. Selection of any of these options will not delay any case management time-lines.

<input type="checkbox"/> Court-Refereed Mediation Program	<input type="checkbox"/> Court-Ordered Nonbinding Arbitration
<input type="checkbox"/> Private Neutral Evaluation	<input type="checkbox"/> Court-Ordered Binding Arbitration (Stipulated)
<input type="checkbox"/> Private Mini-Trial	<input type="checkbox"/> Private Reference to General Referee
<input type="checkbox"/> Private Summary Jury Trial	<input type="checkbox"/> Private Reference to Judge
<input type="checkbox"/> Private Settlement Conference with Private Neutral	<input type="checkbox"/> Private Binding Arbitration
<input type="checkbox"/> Other (specify): _____	

It is also stipulated that the following shall serve as arbitrator, mediator or other neutral: (Name) _____

Alternate: (mediation & arbitration only) _____

Date: _____

Date: _____

Name of Plaintiff

Name of Defendant

Signature

Signature

Name of Plaintiff's Attorney

Name of Defendant's Attorney

Signature

Signature

(Attach another sheet if additional names are necessary). It is the duty of the parties to notify the court of any settlement pursuant to California Rules of Court, 3.1385. Upon notification of the settlement the court will place this matter on a 45-day dismissal calendar.

No new parties may be added without leave of court and all un-served, non-appearing or actions by names parties are dismissed.

IT IS SO ORDERED.

Dated: 11/16/2007

JUDGE OF THE SUPERIOR COURT

SOSC CIV-349 (Rev 01-07)

STIPULATION TO USE OF ALTERNATIVE DISPUTE RESOLUTION

Page: 1

3

1 Simon Manoucherian (Bar No. 198760)
2 SManoucherian@mmhllp.com
3 Frederic Esrailian (Bar No. 232799)
4 FEsrailian@mmhllp.com
5 MESERVE, MUMPER & HUGHES LLP
6 300 South Grand Avenue, 24th Floor
7 Los Angeles, California 90071-3185
8 Telephone: (213) 620-0300
9 Facsimile: (213) 625-1930

CLERK'S OFFICE 1
CIVIL DIVISION

2007 DEC 20 AM 11:41

SUPERIOR COURT
SAN DIEGO COUNTY, CA

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7

6 Attorneys for Defendant
7 BOSTON MUTUAL LIFE INSURANCE COMPANY

8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10
11 FOR THE COUNTY OF SAN DIEGO

12 CHRISTOPHER O'KEEFE,

13 Plaintiff,

14 } Case No. 37-2007-00081644-CU-BC-CTL

15 vs.

16 BOSTON MUTUAL LIFE INSURANCE
17 COMPANY, an unknown business entity,
18 and DOES 1 through 50 inclusive,
19 Defendants.

20 } DEFENDANT BOSTON MUTUAL LIFE
21 } INSURANCE COMPANY'S ANSWER
22 } TO PLAINTIFF'S COMPLAINT

23 Complaint Filed: November 16, 2007

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18 Defendant BOSTON MUTUAL LIFE INSURANCE COMPANY (hereinafter
19 "Boston Mutual") hereby answers Plaintiff CHRISTOPHER O'KEEFE's ("Plaintiff")
20 Complaint as follows:

21 1. Under and pursuant to California Code of Civil Procedure section 431.30(d),
22 Boston Mutual denies, generally and specifically, each and every allegation contained in
23 Plaintiff's unverified Complaint and each allegation of every cause of action set forth
24 therein, and the whole thereof, and denies that Plaintiff sustained damages in the sum or
25 sums alleged, or in any other sum or sums, or at all.

26 ////

27 ////

28 ////

LAW OFFICES
MESERVE,
MUMPER &
HUGHES LLP

89971.1

1
DEFENDANT BOSTON MUTUAL LIFE INSURANCE
COMPANY'S ANSWER TO PLAINTIFF'S COMPLAINT

EXHIBIT B, PAGE 20

AFFIRMATIVE DEFENSES**FIRST AFFIRMATIVE DEFENSE**

2. Boston Mutual alleges that the Complaint, and each purported cause of action alleged therein, fails to state facts sufficient to constitute a cause of action against Boston Mutual.

SECOND AFFIRMATIVE DEFENSE

3. Boston Mutual alleges that any and all of the actions taken by any officer, employee, and/or agent of Boston Mutual were good faith assertions of the rights of Boston Mutual and were therefore privileged and/or justified.

THIRD AFFIRMATIVE DEFENSE

4. Boston Mutual alleges that if the Plaintiff has sustained any damages as alleged in the Complaint, which Boston Mutual denies, he failed to mitigate his damages.

FOURTH AFFIRMATIVE DEFENSE

5. Boston Mutual alleges that the Plaintiff has waived any and all claims that he may have or have had to the relief, if any, referred to in the Complaint.

FIFTH AFFIRMATIVE DEFENSE

6. Boston Mutual alleges that the Plaintiff is estopped from alleging that Boston Mutual caused or contributed to the damages, if any, referred to in the Complaint.

SIXTH AFFIRMATIVE DEFENSE

7. Boston Mutual is informed and believes, and on that basis alleges that its purported obligations, if any, as alleged in the Complaint were fully performed.

SEVENTH AFFIRMATIVE DEFENSE

8. Boston Mutual is informed and believes, and on that basis alleges that if Boston Mutual failed to perform any obligations owed to Plaintiff, which Boston Mutual categorically denies, such performance was prevented or made impossible as a result of acts or omissions of Plaintiff and/or other third parties.

EIGHTH AFFIRMATIVE DEFENSE

9. Boston Mutual alleges that, without conceding that Plaintiff sustained any

1 damages as alleged in the Complaint, if any such damages were sustained by Plaintiff,
 2 Plaintiff failed to and did not exercise ordinary care, caution or prudence on his own behalf
 3 and that the alleged damages, if any, either sustained by Plaintiff or referred to in the
 4 Complaint were directly and proximately caused and contributed to by the acts and/or
 5 omissions of Plaintiff. Accordingly, recovery, if any, on the part of the Plaintiff against
 6 Boston Mutual must be reduced by a proportionate percentage of the wrong attributable to
 7 the Plaintiff.

8 **NINTH AFFIRMATIVE DEFENSE**

9 10. Boston Mutual alleges that, without conceding Plaintiff has sustained any
 10 damages as alleged in his Complaint, if any such damages were sustained by Plaintiff, they
 11 were caused by persons or entities other than Boston Mutual, and at all times, these other
 12 person or entities were acting without the consent, authorization, knowledge or ratification
 13 of Boston Mutual, with regard to any and all of the acts alleged in the Complaint, and the
 14 award of damages, if any, should be reduced by the proportionate percentage of the wrong
 15 attributable to those persons or entities.

16 **TENTH AFFIRMATIVE DEFENSE**

17 11. Boston Mutual alleges that Plaintiff's Complaint, and each purported cause
 18 of action contained therein, is barred, in whole or in part, by the applicable statute of
 19 limitations including, but not limited to, California Code of Civil Procedure Sections
 20 335.1, 337, 338, 339, 340 and 343, Civil Code § 1783, and Business & Professions Code §
 21 17208.

22 **ELEVENTH AFFIRMATIVE DEFENSE**

23 12. Boston Mutual alleges that Plaintiff has not supplied Boston Mutual with
 24 sufficient facts, proof or documentation that would support the payment to Plaintiff of any
 25 benefits under the Policy at issue in the Complaint.

26 **TWELFTH AFFIRMATIVE DEFENSE**

27 13. Boston Mutual alleges that any and all actions taken by Boston Mutual were
 28 fair and reasonable and were performed in good faith based on all the relevant facts known

1 to Boston Mutual at all applicable times.

2 **THIRTEENTH AFFIRMATIVE DEFENSE**

3 14. Boston Mutual alleges that the Complaint, and each purported cause of
 4 action contained therein, fails to state any facts that would entitle Plaintiff to recover
 5 general, compensatory, punitive and/or other damages (including attorney's fees and costs)
 6 against Boston Mutual.

7 **FOURTEENTH AFFIRMATIVE DEFENSE**

8 15. Boston Mutual alleges that Plaintiff's breach of the covenant of good faith
 9 and fair dealing claim fails because a genuine issue of liability exists.

10 **FIFTEENTH AFFIRMATIVE DEFENSE**

11 16. Without conceding that the Plaintiff has suffered any damages as alleged in
 12 the Complaint, Boston Mutual alleges that if any such damages were sustained by the
 13 Plaintiff, those damages should be properly apportioned among all persons or entities who
 14 contributed to those damages in proportion to the fault of those persons or entities,
 15 pursuant to California Civil Code Section 1431.2 and any relevant provisions of California
 16 common and statutory law.

17 **SIXTEENTH AFFIRMATIVE DEFENSE**

18 17. Boston Mutual alleges upon information and belief that the Plaintiff has no
 19 right to recover under applicable law or the terms and conditions of the Policy at issue in
 20 the Complaint.

21 **SEVENTEENTH AFFIRMATIVE DEFENSE**

22 18. Boston Mutual alleges that the bases by which punitive damages are imposed
 23 pursuant to California statutory and common law, are fatally constitutionally infirm, and
 24 that giving effect to such laws is violative of the First, Fourth, Fifth, Sixth, Eighth (except
 25 the excessive fines clause) and the Fourteenth Amendments to the United States
 26 Constitution and the equivalent provisions in the California Constitution.

27 **EIGHTEENTH AFFIRMATIVE DEFENSE**

28 19. Boston Mutual alleges that the California practice of allowing the wealth of

1 an insurance company defendant to be the primary measure for the imposition of a punitive
 2 and exemplary damage award constitutes an impermissible punishment of Boston Mutual's
 3 status in violation of its rights to due process and equal protection of the laws under the
 4 Fifth and Fourteenth Amendments to the United States Constitution and by Article I,
 5 Section 7 of the California Constitution.

6 **NINETEENTH AFFIRMATIVE DEFENSE**

7 20. Boston Mutual alleges that granting Plaintiff's prayer for punitive damages
 8 against it would violate certain provisions of the Constitution of the United States
 9 including but not limited to, the following: The Fifth and Fourteenth Amendments
 10 guarantee this defendant due process of the law and are violated by the operation of such
 11 vague, imprecise and impermissible laws regarding both the awarding and the amount of
 12 punitive damages as are the laws on which the subject punitive damage claim is based; an
 13 award of punitive damages against Boston Mutual under the facts of this case would
 14 violate due process as being grossly excessive in relation to the legitimate interests of the
 15 State of California; the Fourteenth Amendment guarantees this defendant equal protection
 16 of the laws and is violated by the imposition of punitive damages in that such sanction is
 17 discriminatory and arbitrary in penalizing this defendant on the basis of wealth; the Fourth,
 18 Fifth and Sixth Amendments form the basis for laws governing the processing, convicting
 19 and sentencing of criminal defendants and to the extent that the Complaint is subjected to
 20 criminal sanction for punitive damages, the burden of proof required to impose the same
 21 should be proof beyond a reasonable doubt and punitive damages should not be awarded
 22 without affording this defendant full range of criminal safeguards afforded by the
 23 Constitution and the imposition of punitive damages would violated Article I Section XX
 24 of said constitution. Boston Mutual further alleges that in addition to the above, the
 25 imposition of punitive damages against Boston Mutual would violate similar and related
 26 provisions of the Constitution of the State of California.

27 **TWENTIETH AFFIRMATIVE DEFENSE**

28 21. Boston Mutual alleges that the imposition of punitive damages against it

1 would violate California Civil Code Section 3294.

2 **TWENTY-FIRST AFFIRMATIVE DEFENSE**

3 22. Boston Mutual alleges that even if it is determined that Plaintiff is presently
 4 disabled under the terms of the Policy at issue in the Complaint, which contention Boston
 5 Mutual expressly denies, such determination does not mean that Plaintiff would be entitled
 6 to unlimited future benefits under the Policy given, *inter alia*, the possibility of Plaintiff's
 7 recovery, as well as the effect of different requirements, exclusions and/or limitations in
 8 the Policy.

9 **TWENTY-SECOND AFFIRMATIVE DEFENSE**

10 23. Boston Mutual alleges that it breached no duty owed to Plaintiff, if any such
 11 duty was owed.

12 **TWENTY-THIRD AFFIRMATIVE DEFENSE**

13 24. Boston Mutual alleges that it has not engaged in any conduct that would
 14 entitle Plaintiff to any emotional distress damages.

15 **TWENTY-FOURTH AFFIRMATIVE DEFENSE**

16 25. Boston Mutual alleges that Plaintiff is barred from any recovery on his
 17 Complaint and each of the purported causes of action alleged therein under the doctrine of
 18 laches.

19 **TWENTY-FIFTH AFFIRMATIVE DEFENSE**

20 26. Boston Mutual alleges that Plaintiff has received an overpayment of benefits
 21 and any recovery by Plaintiff in this action should be offset by said overpayment.

22 **TWENTY-SIXTH AFFIRMATIVE DEFENSE**

23 27. Boston Mutual is informed and believes, and on that basis alleges, that
 24 Plaintiff breached the agreement(s) upon which he sues and failed to properly and
 25 adequately perform his required obligation(s) thereunder, all of which prevent Plaintiff
 26 from recovering any damages pursuant to said agreement(s).

27 ////

28 ////

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

28. Boston Mutual presently has insufficient knowledge or information on which to form a belief whether it may have additional, yet unstated affirmative defenses. Boston Mutual reserves the right to assert additional affirmative defenses in the event discovery or further investigation indicates that asserting additional affirmative defenses would be warranted.

PRAYER

WHEREFORE, Boston Mutual prays for judgment in its favor and against Plaintiff as follows:

1. An order dismissing the Complaint, with prejudice, as to all defendants and with respect to all claims for relief;
2. An order declaring that Plaintiff should take nothing by his Complaint;
3. An order declaring that no benefits or damages are payable to Plaintiff under the Policy;
4. For judgment against Plaintiff and in favor of Boston Mutual;
5. That Boston Mutual recover its costs of suit incurred herein, including reasonable attorneys' fees; and
6. For such other and further relief as this Court deems just and proper.

Dated: December 18, 2007

MESERVE, MUMPER & HUGHES LLP
SIMON MANOUCHERIAN
FREDERIC ESRAILIAN

By:

Simon Manoucherian
Attorneys for Defendant
BOSTON MUTUAL LIFE
INSURANCE COMPANY

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA }
COUNTY OF LOS ANGELES } SS.:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 300 South Grand Avenue, 24th Floor, Los Angeles, California 90071-3185.

On December 20, 2007, I served on interested parties in said action the within:

**DEFENDANT BOSTON MUTUAL LIFE INSURANCE COMPANY'S
ANSWER TO PLAINTIFF'S COMPLAINT**

by placing a true copy thereof in sealed envelope(s) addressed , as stated below.

Michael B. McDonnell, Esq.

Douglas M. Field, Esq.

Douglas M. Freig, Esq.
MCDONNELL & ROMAKER, P.C.

MCDONNELL & ROMAKER, P.C.
2040 Harbor Island Drive, Suite 202

2010 Harbor Island Dr.
San Diego, CA 92101

I am readily familiar with this firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on December 20, 2007, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Patricia Cormier Herron

(Type or print name)

(Signature)

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA }
COUNTY OF LOS ANGELES } ss.:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 300 South Grand Avenue, 24th Floor, Los Angeles, California 90071-3185.

On December 26, 2007, I served on interested parties in said action the within:

**NOTICE OF REMOVAL OF ACTION TO UNITED STATES
DISTRICT COURT**

by placing a true copy thereof in sealed envelope(s) addressed , as stated below. and causing such envelope(s) to be deposited in the U.S. Mail at Los Angeles, California.

Michael B. McDonnell, Esq.
Douglas M. Field, Esq.
MCDONNELL & ROMAKER, P.C.
2040 Harbor Island Drive, Suite 202
San Diego, CA 92101

I am readily familiar with this firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on December 26, 2007, at Los Angeles, California.

I declare under penalty of perjury that I am employed in the office of a member of the bar of this Court at whose direction the service was made and that the foregoing is true and correct. 

Patricia Cormier Herron
(Type or print name)

Patricia Cormier Ferron
(Signature)

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE SECOND PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

CHRISTOPHER O'KEEFE

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF San Diego
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

Douglas M. Field (SBN 237888)
McDonnell & Associates, P.C.
2040 Harbor Island Drive, Suite 202
San Diego, CA 92101
Tel: (619) 294-4230 Fax: (619) 294-4237

DEFENDANTS

BOSTON MUTUAL LIFE INSURANCE COMPANY

FILLED

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'07 CV 2409 L RBB

SOUTHERN DISTRICT OF CALIFORNIA

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT Massachusetts
(IN U.S. PLAINTIFF CASES ONLY) DEPUTY

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE
TRACT OF LAND INVOLVED.

II. BASIS OF JURISDICTION (PLACE AN 'X' IN ONE BOX ONLY)

<input type="checkbox"/> 1 U.S. Government Plaintiff	<input type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)
<input type="checkbox"/> 2 U.S. Government Defendant	<input checked="" type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN 'X' IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

Citizen of This State	<input checked="" type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business in This State	<input type="checkbox"/> 4	<input checked="" type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business in Another State	<input type="checkbox"/> 5	<input checked="" type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

IV. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.

DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY.) Diversity jurisdiction pursuant to 28 U.S.C. Sections 1332, 1441, and 1446.

V. NATURE OF SUIT (PLACE AN "X" IN ONE BOX ONLY)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input checked="" type="checkbox"/> 110 Insurance	PERSONAL INJURY	PERSONAL INJURY	422 Appeal 28 USC 158	400 State Reappointment
<input type="checkbox"/> 120 Marine	<input type="checkbox"/> 310 Airplane	<input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<input type="checkbox"/> 423 Withdrawal 28 USC 157	410 Antitrust
<input type="checkbox"/> 130 Miller Act	<input type="checkbox"/> 315 Airplane Product Liability	<input type="checkbox"/> 368 Personal Injury - Product Liability	PROPERTY RIGHTS	430 Banks and Banking
<input type="checkbox"/> 140 Negotiable Instrument	<input type="checkbox"/> 320 Assault, Libel & Slander	<input type="checkbox"/> 368 Asbestos Personal Injury Product Liability	<input type="checkbox"/> 820 Copyrights	450 Commerce/ICC Rates/etc.
<input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment	<input type="checkbox"/> 330 Federal Employers' Liability	PERSONAL PROPERTY	<input type="checkbox"/> 830 Patent	460 Deportation
<input type="checkbox"/> 151 Medicare Act	<input type="checkbox"/> 340 Marine	<input type="checkbox"/> 370 Other Fraud	<input type="checkbox"/> 840 Trademark	470 Racketeer Influenced and Corrupt Organizations
<input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans)	<input type="checkbox"/> 345 Marine Product Liability	<input type="checkbox"/> 371 Truth in Lending	SOCIAL SECURITY	810 Selective Service
<input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits	<input type="checkbox"/> 350 Motor Vehicle	<input type="checkbox"/> 380 Other Personal Property Damage	<input type="checkbox"/> 861 HIA (1958)	850 Securities/Commodities/ Exchange
<input type="checkbox"/> 160 Stockholders' Suits	<input type="checkbox"/> 355 Motor Vehicle Product Liability	<input type="checkbox"/> 386 Property Damage Product Liability	<input type="checkbox"/> 862 Black Lung (923)	875 Customer Challenge
<input type="checkbox"/> 180 Other Contract	<input type="checkbox"/> 360 Other Personal Injury		<input type="checkbox"/> 863 DIWC/DIWV (405(g))	12 USC 3410
<input type="checkbox"/> 185 Contract Product Liability			<input type="checkbox"/> 864 SSID Title XVI	881 Agricultural Acts
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	<input type="checkbox"/> 865 RSI (405(g))	882 Economic Stabilization Act
<input type="checkbox"/> 210 Land Condemnation	<input type="checkbox"/> 441 Voting	<input type="checkbox"/> 610 Motion to Vacate Sentence	FEDERAL TAX SUITS	893 Environmental Matters
<input type="checkbox"/> 220 Foreclosure	<input type="checkbox"/> 442 Employment	<input type="checkbox"/> 620 Other Food & Drug	<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)	894 Energy Allocation Act
<input type="checkbox"/> 230 Rent Lease & Ejectment	<input type="checkbox"/> 443 Housing/ Accommodations	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881	<input type="checkbox"/> 871 IRS - Third Party 26 USC 7609	895 Freedom of Information Act
<input type="checkbox"/> 240 Torts to Land	<input type="checkbox"/> 444 Welfare	<input type="checkbox"/> 630 General		900 Appeal of Fee Determination Under Equal Access to Justice
<input type="checkbox"/> 245 Tort Product Liability	<input type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> 535 Death Penalty		950 Constitutionality of State Statutes
<input type="checkbox"/> 280 All Other Real Property		<input type="checkbox"/> 640 Mandamus & Other		990 Other Statutory Actions
		<input type="checkbox"/> 560 Civil Rights		
		<input type="checkbox"/> 565 Prison Conditions		

VI. ORIGIN

(PLACE AN "X" IN ONE BOX ONLY)

<input type="checkbox"/> 1 Original Proceeding	<input checked="" type="checkbox"/> 2 Removal from State Court	<input type="checkbox"/> 3 Remanded from Appellate Court	<input type="checkbox"/> 4 Reinstated or Reopened	<input type="checkbox"/> 5 Transferred from another district (specify)	<input type="checkbox"/> 6 Multidistrict Litigation	<input type="checkbox"/> 7 Appeal to District Judge from Magistrate Judgment
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VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION
UNDER F.R.C.P. 23

DEMAND \$ excess of
\$75,000
CHECK YES only if demanded in complaint:
JURY DEMAND: YES NO

VIII. RELATED CASE(S) (See instructions:
IF ANY)

JUDGE _____

Docket Number _____

DATE

SIGNATURE OF ATTORNEY OF RECORD

December 26, 2007

Simon Manoucherian

PAID \$350 12/26/07 BY KURT #145855

:ODMA/PCDOCS/WORDPERFECT\228161 January 24, 2000 (3:10pm)

UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
SAN DIEGO DIVISION

145855 - BH
* * C O P Y * *
December 26, 2007
09:57:31

Civ Fil Non-Pris
USAO #: 07CV2409 CIVIL FILING
Judge.: M. JAMES LORENZ
Amount.: \$350.00 CK
Check#: BC# 20712014

Total-> \$350.00

FROM: CIVIL FILING
O'KEEFE V. BOSTON MUTUAL LIFE